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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 289

GLENN DOHERTY, LOUIS BERTUCCI, MORRIS ABRAMS, WILLIAM McCABE AND JOHN ZOBOIWCHAK, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in this cause on June 16, 1964. The judgments affirmed their convictions for violating the criminal provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 530, in interfering with the rights granted members under the Act.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania, on a motion to dismiss the indictment, is reported at 50 L.R.R.M. 2974 (A. App. 21a-23a).[1] The opinion of the Court of Appeals has not yet been reported. It is set forth as Appendix A to this petition.

JURISDICTION

The judgments of the Court of Appeals were entered on June 16, 1964 (App. 17a-21a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES AND RULE INVOLVED

Sections 101 (a) (1) and 101 (a) (2) of the Labor-Management Reporting and Disclosure Act of 1959, U.S.C. 411 (a) (1) and 411 (a) (2), provide:

> "Sec 101(a)(1) EQUAL RIGHTS.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
>
> (2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an ele-

[1] The Appendix filed by the Petitioners in the Court of Appeals is cited herein as A. App. The Appendix to this Petition is cited as App.

tion of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Section 610 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 530 provides:

"Sec. 610. It shall be unlawful for any person through the use of force or violence or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Rule 6 (e), Federal Rules of Criminal Procedure, provides:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a show-

ing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

QUESTIONS PRESENTED

(1) Whether a federal judge is required, upon proper request by defense counsel, to read the grand jury testimony of government witnesses *in camera* and to make such testimony available to the defense for purposes of cross-examination should inconsistencies be found between the grand jury testimony and the testimony at trial.

(2) Whether a defendant, indicted for a violation of 29 U.S.C. 530, is entitled to an instruction that the force, violence or threat thereof, which such defendant is charged with exercising against a member of a labor organization, must be for the specific purpose and with the specific intent of interfering with or preventing the exercise of a right to which such member is entitled under the Labor-Management Reporting and Disclosure Act.

STATEMENT

A seventeen-count indictment was returned against the petitioners and one other in the United States District Court for the Eastern District of Pennsylvania on April 11, 1962 (A. App. 1a-20a). They were charged with having infringed upon the rights guar-

anteed certain named individuals by Sections 101 (a) (1), 101 (a) (2), and 101 (a) (5) of the Labor-Management and Reporting and Disclosure Act of 1959, 29 U.S.C. 411 (a) (1), (1) and (5), all in violation of Section 610 of the Act, 29 U.S.C. 530, and with conspiring to do so in violation of 18 U.S.C. 371. The charges against one named defendant were dismissed on motion of the United States (A. App. 26a, 27a) as was the charged violation of Section 101 (a) (5). Following trial the petitioners were convicted on ten of seventeen counts (A. App. 569a-570a) and were sentenced to two one-year prison terms, to run consecutively, and fines and probationary periods in addition thereto (A. App. 581a, 648a-655a).

Background

Transportation Checkers, Receivers and Clerical Workers Local 161 is an unincorporated labor organization in the Philadelphia, Pennsylvania, area affiliated with the International Brotherhood of Teamsters. It represents, among others, the clerical employees of the Philadelphia Transportation Company (PTC), the city's rapid transit operation (A. App. 257a-259a). In 1961, Local 161 had a vocal and well organized minority group which was known as SWEEP. In late 1961, as the time came to consider the negotiation of a new contract with the Company, a membership meeting of Local 161 was adjourned by the presiding officer as a result of disagreement over the right of SWEEP members to present various resolutions relating to the contract (A. App. 433a-445a). The correctness of the presiding officer's ruling and which element within the union caused the meeting to become chaotic were matters of dispute during trial but

are not at issue here. As a result of the adjournment of the meeting, however, no business was effectively conducted.

The minority group then filed suit in the United States District Court for the Eastern District of Pennsylvania. *Axler, et al.* v. *Transportation Checkers, Receivers and Clerical Workers, etc., et al.*, Civil Action 30762 (A. App. 585a-606a). Founded on Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411-415, the suit sought a mandatory injunction requiring the union to hold regular meetings (this had not been the practice) and a specific direction that a meeting be held at which the proposed contract could be considered, discussed and either ratified or rejected. The union consented to an order directing that such a meeting be held on February 22, 1962, and agreed to procedures for a further mail referendum on acceptance of the contract (A. App. 598a-599a).

The February 22, 1962 Meeting and Subsequent Events

The Secretary-Treasurer of Local 161 (the union's principal executive officer), on the day of the proposed meeting, received information that a group of members were "going to cause trouble" at the meeting (A. App. 410a, 435a, 453a). The members involved had signed authorization cards with the Seafarers International Union and sought to substitute SIU as the representative of PTC employees. Charges had been filed against them within the union on grounds of fostering secession and they were later expelled from membership. The events of February 22, 1962, took place between charge and expulsion. At an emer-

gency telephone meeting of the local union executive board, a resolution was passed that nine named members be refused admission to the meeting for the reasons that they were "planning to disrupt and break up the meeting by the use of rowdyism, force, and violence" and that they had "for their object to prevent the members of Local 161 from conducting their regular local union business in an orderly fashion." (A. App. 619a). Prior to the adoption of this resolution, the Local received advice as to its legality from its attorney (A. App. 466a-467a) and the text of the resolution was prepared by another attorney (A. App. 426a-427a).

The list of those persons to be excluded was passed on to the doorkeeper.

When Edmond Flounders was advised that he was not to be admitted (erroneously, for his name was not on the list) a fight ensued. Flounders testified about the fight three times: once in the civil trial, once before the grand jury and, finally, in this case. At the previous civil court hearing, he had testified:

> "Q. And now will you tell Your Honor what you now did. Will you tell His Honor—I beg your pardon—what you now did?
>
> "A. I came to the meeting with the—with Bob Donnelly and Andy Quirk and Bobby Braubitz and myself. They—we all—we all got out of the car together and they, I believe, went over and were talking in a group and I was talking to some other people. In the meantime, I see Bob Donnelly come down and speak to a police officer, a fellow with a crew cut, rather medium build. So I walked away from from them and walked into the union, tried to walk into the union hall, and I

had my union card in my hand and I said, 'Here is my card. I would like to get in the meeting.'

"A. Who did you say that to?

"A. Toots Bertucci. He said, 'Uh-uh.'

"I said, 'What do you mean, Toots, Uh-uh?' I said, 'My union dues are paid. I had received no letter that I had been suspended for any charges against 161 Local.'

"He says, 'Look, God damn it, if you are looking for trouble, you are going to get it.'

"So some fellows come down the stairway after me and kept hollering, 'Toots,' and first thing you know—know—I know, I got a punch in the mouth and started to back away, and about four fellows jumped me, and the last thing I remember I was being picked up out of the gutter out in Spring Garden Street." (A. App. 42a-43a)

Before the grand jury, he had testified:

"A. So he says, 'Uh-uh, you can't come in here.'

"And I says, 'Well, I am a dues-paying member. I pay $6 a month and I haven't been expelled from the union. Why can't I come in?'

"He says, 'Look, God damn it, if you are looking for trouble you are going to get it.'

"So there must have been a stairway coming down this way and there must have been a stairway coming down this way.

"Q. That is to the entrance to the hall?

"A. To where Toots was standing from the upper floors or some place because as soon as he said, 'Look, God damn it, if you are looking for trouble you are going to get it.'

And this fellow clipped me on the side of the face." (A. App. 47a)

At the trial, his testimony was substantially different and, if credited, would have supported the suggestion

that he had started the fight by attempting to force his way into the meeting:

> "Q. And what occurred when you approached that point? A. I took my union card from my pocket and I showed it to Toots and Toots had his back turned towards me and I says, 'I am Flounders, Toots,' and I showed him my union card. I says, 'How about coming in?' He said 'Uh-uh.' I said, 'Well, my union dues are paid. I haven't been expelled. I am a member in good standing. I'd like to come in.' He says, 'Uh-uh.'
>
> Q. Then what happened, sir? A. I don't know whether after I showed Toots this card, I will say Mr. Bertucci because he is a man, I said, 'I don't understand why' and *I don't know whether I was shoved into Toots or whether I took the first punch at Toots* or not but a melee followed." (Emphasis supplied) (A. App. 39a)

While the government was permitted to plead surprise and cross examine Flounders from his prior inconsistent testimony, he refused to be shaken. After being shown such testimony, the following ensued:

> "The only doubt I have in mind would be when I entered the union hall with my union card in my hand and showed it to Toots Bertucci and after I showed it to Toots Bertucci and he said, 'Uh-uh' when I asked him to be admitted and in the events that followed *I am not sure whether I was pushed or whether I took a punch at Toots for not being admitted to the hall.*" (Emphasis supplied) (A. App. 43a)

On cross-examination, he reiterated this testimony:

> "Q. At that point according to your testimony to Mr. DePaul in response to his questions you stated that you might have been pushed in from behind or possibly you took a swing at Bertucci

because you were mad because he wouldn't let you into the hall? A. Yes, sir.

Q. Mr. DePaul tried to read some prior statements to you which he suggested were inconsistent but is it your testimony now, Mr. Flounders, that either you were pushed into Mr. Bertucci while he was standing there or that there is a possibility that you took the first punch at him? A. That's true." (A. App. 69a)

One of the two remaining eye-witnesses who testified, a Mrs. Margaret Walker, stated:

"A. I saw Mr. Braubitz push Mr. Flounders through the doorway.

Q. Yes? A. And as he did Mr.—he grabbed ahold of Mr. Bertucci's shoulders.

Q. Who grabbed—excuse me, who grabbed—— A. Mr. Flounders grabbed Mr. Bertucci's shoulders.

Q. Yes, ma'am. A. And as Mr. Bertucci turned to face him, Mr. Flounders flung his arm out and aimed a punch." (A. App. 416a)

She further testified:

"Q. Is there any question in your mind, Mrs. Walker, that Mr. Flounders threw the first punch? A. No, sir, there is not." (A. App. 416a)

On cross-examination, the Government was not able to shake Mrs. Walker's recollection on this incident. On redirect, she concluded:

"Q. As a result of the questions that Mr. DePaul has asked you about where you were standing is there any doubt in your mind, Miss Walker, as to who threw the first blow that evening? A. No, sir, there is not." (A. App. 421a)

Defendant William McCabe, the only other eyewitness to the incident in question, verified Mrs. Walker's version in its entirety:

> "Q. Yes, sir. I asked you to describe in your own words what if anything happened when you heard this commotion by the door? A. When I heard the commotion I turned around and looked over toward the door. When I looked over I seen a bunch of fellows trying to get in past Mr. Bertucci there and *I seen one fellow, which I later found out was Mr. Flounders, he threw a punch at Mr. Bertucci.*" (Emphasis supplied) (A. App. 495a)

Whatever the origin of the affray (and it becomes significant in view of several of the requested instructions which were refused), Flounders was rather severely beaten in the fight which followed. While this was the first, and only, act of violence, other persons were also excluded from the meeting.

Soon after the meeting was held, the plaintiffs in *Axler, et al.* v. *Transportation Checkers, etc., et al., supra,* returned to the United States District Court for the Eastern District of Pennsylvania, and sought a contempt citation against the officers of Local 161 for violating the consent order to which they had previously agreed by excluding members from the court-ordered meeting. After a lengthy hearing, at which the full details of the scuffle were aired, the trial judge denied the motion in an opinion which contained the following language:

> "It is the judgment of this Court that the Court's order of February 1, 1962, has been complied with, and for that reason the motion of the plaintiffs is denied.

It is not to be understood by this order that the Court condones what was done with regard to those individual members who were barred admittance. The Court passes no judgment whatsoever on whether the individual rights of those persons were violated such as to give them individual causes of action under the Act.

But the Court is satisfied that the actions taken by the defendant union were made in good faith, and after consultation with their counsel, and a judgment made dealing with circumstances as they then appeared to exist." (Emphasis supplied) (A. App. 606a)

The indictment was returned one month later.

The Trial of the Criminal Case

Early in the course of the trial, counsel for the petitioners asked the court to review *in camera* the grand jury testimony of all government witnesses and turn such testimony over to the defense for use on cross-examination if inconsistencies were found with the testimony which was given at trial (A. App. 94a-95a). The government did not object and the trial court took the request under advisement. Upon the court's return to the bench the next day, the following ruling was announced:

"The Court: Let the record show that Mr. Bergan requested the Court to read in camera the testimony of various witnesses who testified before the Grand Jury, and also that if there is any variance between their testimony before the Grand Jury and their testimony before this jury, that he, Mr. Bergan, be permitted to read the testimony and use it for cross-examination. Is that right?

* * * * * * * * *

> The Court: Yes, and the Court has studied the matter and concluded that it would not be proper to give Mr. Bergan the testimony of the various witnesses who will testify before this jury that testified before the Grand Jury, but has ruled in all cases where Mr. DePaul pleads surprise as to the testimony of any witness who testified before the Grand Jury, that that witness's testimony will be made available completely to Mr. Bergan. Otherwise, the testimony before the Grand Jury shall remain secret." (A. App. 255a-256a)

His denial was further explained in his ruling on the motion for a new trial:

> ". . . as I told counsel I didn't feel that I should assume the responsibility of reading all through the testimony before the Grand Jury and telling whether or not it complied, . . . *the responsibility to say that it varied . . . would be a responsibility to which the Court didn't want to assume.*" (Emphasis supplied) (A. App. 574a)

Prior to the conclusion of the case, the court asked for and received a series of instructions from both the government and the defense as to the theory under which the case should be submitted to the jury. The defense submitted a series of instructions which sought to inform the jury of the specific intent required to violate the statute and the meaning of the concept of willfullness (A. App. 644a-647a). The instructions were patterned after those which had previously been approved by this Court and by the Courts of Appeals under the Federal Civil Rights Act, 62 Stat. 696, as amended, 18 U.S.C. 242. The instructions sought to inform the jury, *inter alia*, that force offered in response to an attack, or in aid of the de-

fense of another, or during a spontaneous outbreak did not violate the Act. The specific instructions involved, all of which were denied by the Court, are annexed hereto as Appendix B.

REASONS FOR GRANTING THE WRIT

In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 401 (1959), this Court, in holding that the defense did not have an absolute right to the grand jury testimony of government witnesses, concluded with the following paragraph:

> "Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider that problem because petitioners made no such request of the trial judge. . . . *Resolution of that question must await a case where the issue is presented by the record.* The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have." (Emphasis supplied)

Petitioners ask this Court now to decide the question then specifically left for later determination.

Since 1959, there has arisen a direct and irreconcilable conflict in the circuits as to the correct procedure to be followed. The United States Court of Appeals for the Second Circuit in *United States* v. *Giampa*, 290 F.2d 83, 85 (2nd Cir. 1961), has made it clear that the defense has the right to such an *in camera* examination. In laying down a rule to be followed by District Courts within the Second Circuit, the court stated:

> "To avoid uncertainty in the future upon trials wherein this problem arises, certain fundamental principles should be observed. If the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial. If it is then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the Grand Jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel."

On the other hand, the United States Court of Appeals for the District of Columbia Circuit in *Gordan* v. *United States*, 299 F.2d 117, 118-19 (D.C. Cir. 1962), although ordering such inspection, specifically refused to follow the broad holding of Giampa:

> "To be distinguished from our ruling are those decisions elsewhere which indicate the availability of *in camera* inspection by the trial judge regardless of the number of prosecution witnesses at trial who may also have testified before the grand jury. [citing *Giampa*]. We do not agree with the broad sweep of these holdings and we decline to adopt a rule which goes so far."

The United States Court of Appeals for the Eight Circuit, in *Hance* v. *United States*, 299 F.2d 389, 398 (8th Cir. 1962), has also declined to follow *Giampa*, as has the Tenth Circuit in *Bary* v. *United States*, 292 F.2d 53 (10th Cir. 1961). The Third Circuit has now cast its lot with those circuits specifically disapproving *Giampa*. In the case at bar, the Court of Appeals made the following comment:

> "Appellants cite *United States* v. *Giampa*, 290 F.2d 83, 85 (2nd Cir. 1961) as the legal basis for

their request. With all respect, we think that decision misconceives the problem and fails in its attempted resolution thereof." (App. 8a-9a)

Also see *United States* v. *Boyance*, —F.2d—(3rd Cir., Mar. 26, 1964), certiorari denied, *sub nom, Feldman* v. *United States*, —U.S.—(1964).

Classically, the following reasons have been forwarded in support of grand jury secrecy—to prevent fugitivity by a prospective defendant, to prevent possible tampering with prospective grand jury witnesses, to prevent damage to innocent persons by disclosure of derogatory information about them, to insure freedom of deliberations by the grand jurors and to insure freedom of disclosure by witnesses before the grand jury. *United States* v. *Rose*, 215 F.2d 617, 628 (3rd Cir. 1954); *United States* v. *Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D.Md. 1931); *Pittsburgh Plate Glass Co.* v. *United States, supra* at 405 (dissenting opinion). None of these reasons are valid after a witness has testified at trial and his prior grand jury testimony is sought. Wigmore concludes, VIII Wigmore, *Evidence* (McNaughton rev. 1961), § 2360:

"But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused:

(1) If the grand jury *indicts* D on W's testimony, it is plain that secrecy is no longer of any avail, for W will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of

> the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce. *If on the other hand his testimony now is inconsistent with that before the grand jury, the privilege ought not to apply. The need for the evidence in the criminal prosecution of D exceeds any injury that would inure to the witness-grand jury relation.*" (Emphasis supplied)

The reasons urged against disclosure are identical to those which were urged against the formulation by this Court of the so-called Jencks rule. See *Jencks* v. *United States*, 353 U.S. 657, 666 (1957):

> "The Government opposed petitioner's motions at the trial upon the sole ground that a preliminary foundation was not laid of inconsistency between the contents of the reports and the testimony of Matusow and Ford."

Just as this Court rejected that argument in *Jencks*, so did the Second Circuit, with respect to grand jury testimony, in *Giampa:*

> "This approach is quite unrealistic and would defeat the very purpose of the inspection. How can court or counsel know whether there is inconsistency or not unless the minutes are first read?" 290 F.2d, at 85.

It may be a realistic burden to require the showing of some "particularized need," *Pittsburg Plate Glass, supra* at 400, when outright access to the grand jury testimony is demanded by the defense; but it should be quite another matter when *in camera* inspection is sought.

Petitioners submit that the issue specifically left open in *Pittsburgh Plate Glass* is now ripe and timely for decision by this Court.

2. This was the first case tried before a jury in which a violation of 29 U.S.C. 530 was charged. Defendant's Requested Instructions 20-23 and 27 (Appendix B, App. 22a-23a) all sought to provide some guidance for the jury on the specific nature of the offense here charged. The requests, though founded strictly on the language of the statute, were denied. The statute is clear:

> "It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Perhaps the closest analogy to this statute is found in the Federal Civil Rights Act, 62 Stat. 696 as amended, 18 U.S.C. 242. That statute (and its predecessor), in language remarkably similar to the one at bar, provides:

> "Whoever, under color of any law . . . willfully subjects any inhabitant . . . to the deprivation of any rights . . . secured and protected by the constitution or laws of the United States . . . [shall be punished as the law provides]."

The meaning of the word "willfully" under that statute has undergone a long course of judicial construc-

tion, an analysis of which is helpful in determining the propriety of the requested instructions to this case. The leading case is *Screws* v. *United States,* 325 U.S. 91 (1945), in which this Court concluded, at pg. 101:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, the world denotes an act which is intentional rather than accidental. And see United States v. Illinois C. R. Co. 303 U.S. 239. But 'when used in a criminal statute it generally means an act done with a bad purpose.' Id, 290 U.S. p. 394. And see Felton v. United States, 96 U.S. 699; Potter v. United States, 155 U.S. 438; Spurr v. United States, 174 U.S. 728; Hargrove v. United States (CCA 5th) 67 F(2d) 820, 90 ALR 1276. In that event something more is required that the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra; United States v. Murdock, supra. And that issue must be submitted to the jury under appropriate instructions. United States v. Ragen, 14 U.S. 513, 524:"

The Court then went on to review the legislative history of the statute, and said:

> "Moreover, the history of § 20 affords some support for that narrower construction. As we have seen, the word 'willfully' was not added to the Act until 1909. Prior to that time it may be that Congress intended that he who deprived a person of any right protected by the Constitution should be liable without more. That was the pattern of criminal legislation which has been sustained without any charge or proof of scienter. Shelvin-

> Carpenter Co. v. Minnesota, 218 U.S. 57; United States v. Balint, 258 U.S. 250, supra. And the present Act in its original form would have been susceptible of the same interpretation apart from the equal protection clause of the Fourteenth Amendment, where 'purposeful discriminatory' action must be shown. Snowden v. Hughes, 321 U.S. 1, 8. But as we have seen, the word 'willfully' was added to make the section 'less severe.' We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness."

Mr. Justice Douglas' language in Screws is equally adaptable to a consideration of Section 610 of the Act. 29 U.S.C. 510. The legislative history provides a very close analogy. The original Kennedy-Ervin Bill, S-505, 86th Cong., 1st Sess., contained no provision such as is presently found as 29 U.S.C. 530. Nor did the Administration Bill S-748, 86th Cong., 1st Sess., I HISTORY, 84-150,[2] introduced by Senator Goldwater. The provision first appeared in Congress as Section 413 (b) of the McClellan Bill, S-1137, 86th Cong.,

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[2] All pertinent parts of the legislative history are compiled in two volumes in Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 prepared by the National Labor Relations Board (Government Printing Office 1959). This compilation is cited hereinafter as I HISTORY, ——. Thus, S. 505 is found at I HISTORY, 29-79.

1st Sess., I HISTORY, 260-324, and, in its initial form, a willful violation of the statute was a felony punishable by *five years* and $10,000. I HISTORY, 319. The Senate Committee on Labor and Public Welfare, to which all three bills were referred, reported S-1555 on April 14, 1959, S. Rpt. No. 187, 86th Cong., 1st Sess., I HISTORY, 397-515, and Section 506 (c) of the bill as reported contained a similar provision to what is now 29 U.S.C. 530, with the exception that a willful violation was a felony punishment by *two years* and $10,000. I HISTORY, 390. S-1555 passed the Senate on April 25, 1959 with that provision. I HISTORY, 516, 575. The Landrum Bill, H.R. 8400, 86th Cong., 1st Sess., I HISTORY, 619-686, was then introduced in the House of Representatives in July of that year and contained a similar provision, but in a statement to the House Committee on Education and Labor, then considering the Landrum Bill, Senator John McClellan, one of the principal architects of this legislation, made it very clear that good faith actions, even expulsion or exclusion from a meeting, do not violate the statute:

> "The criminal enforcement provisions in section 607 [the section number in the bill at that time] also meet with union disapproval. These provisions, of course, are the same as in the original Kennedy-Ervin bill as it was reported out of the Labor Subcommittee. The criticism of this provision typically fails to stress one significant fact; namely, that *no one can be punished unless he has willfully interfered with a member's rights. No officer, who in good faith, makes rulings at a union meeting or who has a drunken and disorderly member excluded from a meeting, can be subjected to any criminal penalty.* Nor, indeed, would I expect any prosecutor even to consider

instituting criminal prosecution in such a case." *Congressional Record,* June 16, 1959, p. 9934 (Emphasis supplied), II HISTORY, 1295.

After the House Committee on Education and Labor reported the bill to the House of Representatives, the felony provision was removed and replaced by a penalty of *one* year and $1,000. Congressional Record, August 13, 1959, p. 14513. II HISTORY, 1685. And Congressman Steward Udall (now Secretary of the Interior), in commenting on this reduction, made the following statement:

> "Sixth. Criminal penalties for forceable interference with rights guaranteed by the act: This was a major dispute between the supporters of the Elliott and Landrum-Griffin bills during floor debate. It was the contention of the backers of the Elliott bill that the Landrum-Griffin penalties were so stringent that they might deter honest men from seeking and holding union office. We argued that the rights conferred by the act were so numerous and varied that in most instances the penalty did not fit the crime with the result that this sanction would be both harsh and unworkable. Our argument on this point prevailed and the Landrum-Griffin bill was quietly amended so that the drastic felony penalty was reduced to a misdemeanor. This solution was then adopted by the conference report."
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> *Congressional Record,* September 4, 1959, p. 16637. II HISTORY, 1722.

Thus, it is clear that the intent of Congress has been, from the outset, not only to keep the penalty within reasonable bounds and to impose a penalty only under those circumstances where one is absolutely required, but to eliminate from criminal consideration good

faith action by union officers and members. The analogy to the Federal Civil Rights Act is clear.

Under *Screws, supra,* at 107, the defendants are entitled to have the jury, in determining "whether [the] requisite bad purpose was present," "consider all the attendant circumstances—the malice of the petitioners, the weapons used in the assault, its character and duration, *the provocation, if any,* and the like." (Emphasis supplied). Similar standards should apply to this statute and the trial judge erred in failing to grant petitioners' requested instructions (A. App. 644a-645a). The evidence was at least susceptible of a conclusion that the exclusion was to be accomplished peacefully. Except for the Flounders incident, it was. Both prior to and after that incident such peaceful exclusions did occur. Under such circumstances, failure to allow the jury to determine "the provocation, if any" which led to the melee was error.

It is submitted that had petitioners Bertucci and McCabe struck Flounders in self-defense, and *not with the specific intent to enjoin him from attending the meeting,* there would be no violation of the statute. Yet, the Court refused to submit an instruction to that effect to the jury. Analysis of other cases under 18 U.S.C. 242 supports the suggestion of the additional charges on the origin of the affray as bearing on the element of willfulness. A close analogy appears in *Clark* v. *United States,* 193 F.2d 294 (5th Cir. 1951). In that case the appellant was indicted, under 18 U.S.C. 242, for inflicting a beating upon one Carlisle, a prison inmate, as a result of which Carlisle died. Clark contended that he had beaten Carlisle in an effort to overcome his resistance to being placed in a cell. Although the jury did not agree, the significant

fact is that the trial court gave, and the Court of Appeals affirmed, an instruction on the question of *excessive* force. 193 F.2d, at 295. The Court of Appeals concluded that the charge stated the law "with substantial accuracy." 193 F.2d, at 297. In *McDonald* v. *United States,* 9 F.2d 506 (8th Cir. 1925), the accused was indicted for conspiring to oppress one A. J. Akard in the exercise of his (Akard's) right to hold the office of Postmaster. The indictment charged:

> "'* * * in pursuance of said unlawful and felonius agreement, combination and conspiracy, and in the prosecution thereof' defendants bound and, with a revolver and whips, attacked Akard and directed him 'to leave the county before sunset of the following day.'"

The accused requested a charge which stated his theory of why the beating occurred:

> "You are instructed that before you can convict the defendants you must believe from the evidence beyond a reasonable doubt that they conspired together to prevent the prosecuting witness, Akard, from discharging the duties of the office of postmaster and that pursuant to the conspiracy and in furtherance thereof they beat and threatened Akard for the purpose and with the specific intent to prevent him from discharging his duties of the office of postmaster; and you are instructed that *although they conspired together to beat and threaten the prosecuting witness, Akard, yet if the conspiracy and beating was because of the reports they had heard about his conduct toward the girl,* or for any other reason except the specific intent to prevent him from discharging and performing the duties of postmaster, *the defendants must be acquitted,* and the fact that *if Akard had been driven out of the state he could not perform*

> *the duties of postmaster, would not make the defendants guilty unless they conspired with the specific intent to prevent him from discharging the duties of postmaster.*" (Emphasis supplied)

The trial court refused such a charge and the Eighth Circuit, reversing, 9 F.2d at 508, commented "... something in the nature of this request should be given if asked," at the new trial.

There is no reasonable doubt in this case that various members were excluded from a union meeting. There is also no room for doubt that some violence *accompanied* that exclusion. The Court of Appeals said:

> "The evidence as a whole, to say the least, was quite sufficient for that body [the jury] to decide as it did that the expressed purpose of Bertucci and the others involved in the Flounders incident was to attempt to bar him from the meeting and the exercise of his membership rights, which attempt was entirely successful." (App. 12a)

But the question is not whether violence *accompanied* the exclusion but whether it was inflicted *with intent* to exclude. While the petitioners would quarrel with the court's conclusion in any event, their basic complaint is that the jury, as instructed, could have convicted them simply because Flounders was in a fight. The question of provocation, among others, was never submitted.

In as sensitive an area as intra-union politics and policies, the federal government should intrude only to protect some federally guaranteed right. The guarantee of these rights and the protection afforded as

a result of them is at the heart of the 1959 labor reform legislation. To stretch these guaranties to cover a case in which a federal crime is created (by the refusal to give properly limited instructions) from a normal police court assault and battery situation, is to go far beyond either the intent or power of Congress. This Court recognized this limitation in *Screws;* the analogy is equally applicable here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

RAYMOND W. BERGAN
EDWARD DAVIS
Counsel for Petitioners.

July 1964

APPENDIX A

Opinion and Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14,345, 14,351, 14,352, 14,353 and 14,354.

UNITED STATES OF AMERICA

v.

LOUIS BERTUCCI, also known as "Toots"; GLENN DOHERTY; MORRIS ABRAMS; WILLIAM MCCABE, also known as WILLIAM G. SMITH; and JOHN ZOROIWCHAK, also known as John Zuroick

Glenn Doherty, *Appellant in No. 14,345*
Louis Bertucci, *Appellant in No. 14,351*
Morris Abrams, *Appellant in No. 14,352*
William McCabe, *Appellant in No. 14,353*
John Zoroiwchak, *Appellant in No. 14,354*

Appeals from the United States District Court for the Eastern District of Pennsylvania

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Argued March 17, 1964

Before: MCLAUGHLIN, GANEY and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 16, 1964)

By MCLAUGHLIN, *Circuit Judge.*

Appellants, with Jerry Barsuglia, were indicted and tried for conspiracy to commit offenses in violation of Sections 101(a)(1), 101(a)(2), 101(a)(5) and 610 of the

Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. §§ 411(a)(1), 411(a)(2), 411(a)(5) and 530 and of sixteen related substantive offenses in violation of Section 530.[1] Rita Mancini was named in the indictment as an unindicted co-conspirator. At the conclusion of the trial, on motion of the Government, the indictment against Barsuglia was dimissed. All of the appellants were found guilty on Count One, the conspiracy count. On the substative counts Bertucci was found guilty on Counts Two and Six, involving Flounders and Axler; not guilty on Counts Seven and Eight, involving Mrs. McKay and Mrs. Corr. Doherty was found guilty on Counts Twelve, involving Graffigna; not guilty on Counts Eleven and Thirteen, involving Campbell and Kropp. Abrams guilty

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[1] "§ 411. Bill of rights; constitution and bylaws of labor organizations

"(a) (1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

"(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

* * * * * *

"§ 530. Deprivation of rights by violence; penalty

"It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

on Count Three, involving Flounders. McCabe guilty on Counts Four, Fourteen, Fifteen and Sixteen, involving Flounders, Kay, Corr, Campbell and Quirk. Zoroiwchak guilty on Count Five, involving Flounders. The offenses of which appellants were convicted involved infringement of the civil rights of the persons noted under Sections 101(a)(1), 101(a)(2) and 101(a)(5) of the said Act and in violation of Section 610 thereof in that they conspired to and did prevent by the use of force and violence those persons from exercising their right to attend and participate in a membership meeting of Transportation, Checkers, Receivers and Clerical Workers Union, Local 161, on February 22, 1962 at 105 Spring Garden Street, Philadelphia, Pennsylvania, and to express their views, etc. upon matters properly before the meeting and of conspiring to so prevent them.

Local 161, consisting principally of employees of the Philadelphia Transportation Company (PTC), was organized in 1955 and is affiliated with the Teamsters Union. It has always been tightly controlled by Lawrence J. Mullen as Business Manager and Secretary-Treasurer. Until 1960, he and the Executive Board appointed the Local's officers and trustees. In 1960 there was an election of officers at which Mullen and his group were unopposed. Mullen alone has always possessed the power to name the union's shop stewards. Sometime prior to August 1961 some of the members, including a majority of those whose rights were found to have been infringed by appellants, sought to obtain changes in the union which would give the membership general a voice in its affairs. Those efforts were unsuccessful in August and September of that year. In October they helped in inducing Mullen to call the first meeting of the membership to be held in a year. The proposal to have the stewards elected rather than appointd got nowhere at that meeting. The President of the Local as chairman and Mullen who took over

as chairman, refused to listen to it; the latter peremptorily adjourned the meeting. The minority, by then called Sweep, went into the district court seeking protection of the members' rights, inter alia, that regular meetings be held and that the court designate a meeting at which the supposedly proposed PTC contract could be passed upon. Prior to any action by the court, Mullen negotiated a collective bargaining agreement with PTC on January 23, 1962 which the latter considered "a bona fide contract. • • • As of February 1st." Mullen then sent out a letter calling for a vote by mail on a proposed collective bargaining agreement with PTC with the ballots to be counted February 2, 1962. The letter fixed February 22, 1962 for a membership meeting; it stated "All explanations concerning the procedures will be made. All questions will be answered." The district court on February 1, 1962, by agreement of the parties, fixed general membership meetings to be held February 22 and 24, 1962 with ballots cast by mail to be received not later than February 28, 1962.

All of the above brings us to the meeting of February 22, 1962. The five appellants were present in and about the meeting hall. Bertucci and Doherty were employees of the Local. Six days before the meeting Bertucci's salary had been raised from $95 a week to $140 and Doherty's from $60 to $100 a week. McCabe, Abrams and Zoroiwchak were shown to be members of the Teamsters Local 107, the first two were salaried employees of same at $150 per week apiece.

There was trial testimony by Edmund Flounders, a member of the Local and of Sweep, that on February 22, 1962, the date of the meeting his dues were paid up and that he sought admision to the meeting from appellant Bertucci who was at a table just inside the entrance door of the hall. He said that he showed his union card to Bertucci " • • • and he [Bertucci], said 'Uh-uh' ". As the witness admitted later, Bertucci would not allow him to

enter the hall. The witness stated that he said, "I don't understand why * * *", continuing, he testified that "* * * I don't know whether I was shoved into Toots [Bertucci] or whether I took the first punch at Toots or not but a melee followed." At that point the Government pleaded surprise to the testimony "because it is at variance with prior statements given to the Government by the witness." The motion to cross-examine Flounders was granted. The witness was asked, "* * * did you ever mention taking the first punch to Mr. Mahlon Price of the F.B.I.?" A. "No, I did not." Q. "Did you ever mention it at any time during the testimony under oath before Judge Luongo?" A. "I don't remember." The witness was shown his testimony before Judge Luongo where he had testified that Bertucci had said to him, "Look, God damm it, if you are looking for trouble you are going to get it." Regarding this he stated "If it is in the record I did." He was also shown the Grand Jury notes where he had made the same statement and said, "I said that." He testified that he was knocked down and slugged, that "somebody hit me with a pipe on his shoulder and somebody hit me with a baseball bat over here * * * I was unconscious". He identified appellants McCabe and Abrams as two of the men who hit him. There was testimony by Andrew J. Quirk that Bertucci, McCabe and another had refused Flounders admission; that Flounders came out of the door backwards; that a punch missed him and hit someone else; that Flounders started to run towards the street and that McGabe "a big man in a sweater was chasing him"; that McCabe hit Flounders and knocked him down; that Flounders was picked up, his nose and mouth all bloody, put into a car and taken to the hospital. Mr. Quirk said he did not see Flounders punch anyone at the door. Daniel W. Haag testified he saw Flounders while the latter was trying to obtain admission. He thought he was talking to Barsuglia, "* * * after that I heard the commotion and I saw him coming back toward

me." He did not see Flounders do anything. Mrs. McKay testified that prior to the meeting Bertucci was behind a desk and gave Mrs. McKay and the people with her, including Mrs. Corr, attendance slips to fill in with names, addresses and telephone numbers; that Doherty and another man later advised them that they had to go "• • • he had orders • • • they had to leave"; that McCabe came up to them and told a Mr. Campbell who was in the group that it was none of his business [why Mrs. McKay and Mrs. Corr had to leave] and for Campbell to mind his business "or he'd leave too". Mrs. McKay said she left because she "was afraid to stay longer". Mrs. Corr, as a witness, told how Rita Mancini a member of the Local who sits with the Board had pointed out Mrs. McKay and herself to appellants Doherty and McCabe who advised those people they had to leave the hall. Mrs. Corr left because she was afraid. Mr. Campbell corroborated the two women to a large extent. He was stopped by Doherty who told him he would have to leave because he had been expelled or suspended. He heard Doherty say the same thing to Mrs. McKay and Mrs. Corr.

Nathan Axler, a Local member, on the day and time of the February 22nd meeting observed the hall entrance blocked by Bertucci, Barsuglia and Rita Mancini seated at a table. He saw and heard Bertucci holler at him, Messrs. Donnelly and Braubitz that they had been suspended and weren't allowed to attend the meeting. He saw Haag whom he had brought to the hall "reeling back holding his month • • • he was bleeding from the mouth • • • he has a heart condition, • • • I grabbed him, pushed him against the wall of the building and stood over him to prevent him being hit again." He said "Mr. Barsuglia said to me that I ought to leave before somebody got hurt and Mr. Bertucci was hollering at me and he said, 'I'll get you, you s.o.b. • • • ' He used the full words." He saw Flounders "on the ground, bleeding from the face and

head. He was being helped to his feet by Mr. Donnelly and somebody else, I don't remember who."

Donnelly, a Local member, on the 22nd went to the hall doorway where Bertucci was standing. The latter told him, "You are not allowed in • • • you were expelled." Donnelly told Bertucci he had not been expelled. Bertucci replied, "Well, you were told you are not getting in." Donnelly saw Flounders come out of the hall backwards with his hands extended over his head. He saw men following Flounders "• • • and Flounders went down against this parked car. • • • A member of the Labor Squad came down and this one fellow was leaning over a car like hitting—to hit Flounders • • • The officer pushed this man back. He said, "That's enough, Bill." There was most substantial further testimony by witnesses Martone, Coughlin, Kropp, Maier, Braubitz along the same general lines. Police Officer Gordon said that he and other officers were patrolling the meeting area. Some 15-20 feet from the entrance door they saw Abrams, McCabe, Zoroiwchak and Joseph McCreel standing on the northeast corner of Hope and Spring Garden Streets in a group of fifteen to twenty men "what we thought were Teamster members • • •." A group of about six to eight men came over to them and said they had been denied admission to the hall. The officer believed they had told him they were Local 161 members. Then the officers "heard some type of noise • • • somebody yelling or shouting, or whatever it was that caused us to look around." The location of the noise was closer to the other entrance to the hall. They then saw "a group of people all running, or some of them walking, a lot tof them running towards the scene or the point of attention. • • • Some of the people running were the same people I had seen on the corner. • • • William McCabe, Morris Abrams, John Zoroiwchak and others • • • I believe I saw Louis Bertucci." Gordon went to the scene, saw a man laying on the ground. He observed McCabe

and Abrams close to him and pushed them back. After that Gordon requested radio help and "probably at least six to eight police vehicles of various types" responded. Gordon and his partner saw a group of Teamsters including McCabe, Abrams and Zoroiwchak walking toward Second and Spring Garden and ordered them to walk back towards Hope Street and Spring Garden. Gordon put in another call for assistance. The group of Teamsters reached their parking lot at Hope and Spring Garden. "• • • they all hollered nobody can go on their parking lot because it was theirs." The police ordered the Teamsters group from the parking lot and they went into the union hall. Gordon recalled that just about 8:00 P.M. the evening of the meeting of February 22nd, he saw Bertucci in the doorway of the union auditorium.

Appellants' main point, argued at considerable length, is that the district court erred in refusing to review the Grand Jury testimony of Government witnesses and to make such testimony available if inconsistencies appeared. It will be remembered that the Government pleaded surprise to the trial evidence of the witness Flounders as inconsistent with his statements to the Grand Jury. All of Flounders Grand Jury testimony was at that time given the defense. What the defense then did was make a motion for the trial court "• • • to examine in camera the Grand Jury testimony of all persons who testified for the Government and if inconsistencies are found to turn them over to the defense to utilize in cross-examination." The trial judge ruled the all inclusive request was improper and denied it. He expressly stated that, as with the Flounders' testimony, he would have turned over to the defense the Grand Jury testimony of any other trial witness where the Government pleaded surprise.

Appellants cite United States v. Giampa, 290 F.2d 83, 85 (2 Cir. 1961) as the legal basis for their request. With all respect, we think that decision misconceives the

problem and fails in its attempted resolution thereof. The Supreme Court in this kind of a situation tells us in unmistakable language that "The burden . . . is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400, 403-404 (1959). This court in United States v. Boyance, et als, F.2d (March 26, 1964) faced the exact question which here confronts us and in an opinion by Judge Staley, held:

> "We think that the rule of the Second Circuit as expressed in United States v. Giampa, supra, equates the right of the defense to an examination of Grand Jury testimony to the right to the production of a Jencks Act statement. The only distinction is that the trial judge must first examine the Grand Jury transcript. But the Supreme Court has expressly held that the rationale of Jencks is not to be applied to Grand Jury testimony, and that the defendant has the burden of establishing a particularized need for such testimony. Pittsburgh Plate Glass Co. v. United States, supra. The question then is whether such a need has been shown in the case at bar."

As we have seen, the need for supplying the defense with Flounders' Grand Jury testimony was immediately recognized and taken care of. Appellants would have it that, even assuming their above general request was properly refused, they should have been allowed access to the testimony of Officer Kaczur. The complete answer to this is that in the judgment of the trial court the particularized need of it was not shown. Without question, this was a matter for the discretion of the judge. Our own examination of the trial record gives no indication that the court absued its discretion. St. Clair v. United States, 154 U.S. 134, 150 (1894). United States v. Socony-Vacuum

Oil Co., Inc., et al., 310 U.S. 150, 233 (1940). Berry v. United States, 295 F.2d 192, 195 (8 Cir. 1961).

Appellants argue that the convictions are not supported by sufficient evidence; that judgments of acquittal should have been granted. We have briefly stated a general outline of the Government evidence. While this is by no means all inclusive, the raw material from the record without inference or comment does reveal that the Government presented a case both on the conspiracy and substantive counts against all of the appellants that fully justified its submission to the jury. It was specially stressed on oral argument that the convictions of Abrams and Zoroiwchak are unsupported by evidence. This is not in accord with the record. Flounders testified that he remembered Abrams hitting him at the time, as he said, "When I was knocked out of the Union Hall? • • • Physically knocked out • • • And the only thing I remember before I became unconscious was these men hitting me." He identified the men who hit him as being present in the court room. He was asked, "Will you point them out by number?" He answered "I remember Bill McCabe hitting me." He was next asked "Which other?" A. "I remember Abrams." Q. "Which one is Abrams?" A. "Next to Toots Bertucci."

Flounders was also asked "With reference to your testimony before the Grand Jury you refer to a person called John Zoroiwchak. Is he in the courtroom?" A. "Yes, he is." Q. "Will you point him out sir?" A. "The third man from the end." Officer Kaczur who was outside the union hall at the time of the meeting identified Zoroiwchak as one of a group of men wearing Teamster 107 jackets standing on the corner of Spring Garden and Hope Streets adjacent to the hall. He said there was a big commotion and the men with the 107 insignia ran in the direction of the commotion. He identified McCabe,

Abrams and Zoroiwchak as in that group. Kaczur and his partner Gordon followed and "By the time we broke this what you call mob, got in the center of the circle, there was a man lying on the highway." That man was Flounders. A half hour later he saw the same group heading for Second and Spring Garden Street. He said "That crowd was going to 2nd and Spring Garden St. and they were going after four men that got out of a car at 2nd and Spring Garden * * *." Kaczur testified that he and Gordon told the extra police who had come on the scene "on the assist call" to disperse that crowd. The crowd dispersed and stood on the union parking lot. Kaczur and Gordon told the other police to disperse the crowd out of the area or have them go into the union hall. The crowd "Approximately the crowd that was hanging on the corner, about 15, 20 men. * * * They all went—started going to their cars and they were taking baseball bats out of their cars and they were taking the baseball bats into the union hall." He specifically saw McCabe, Abrams and Zoroiwchak in that crowd and had seen them prior to that, running between the parked cars. He stated that he saw them enter the union hall with baseball bats. Officer Gordon, who testified even more carefully than Kaczur, substantially corroborated the latter's evidence. Gordon was the one whom the witness Donnelly said he saw, pushing a man back who was "* * * like hitting—to hit Flounders." Donnelly stated that Gordon said to the man "That's enough, Bill." It seems to us, as we have above noted, that with reference to Abrams and Zoroiwchak, as with the other appellants, the evidence and the fair inferences therefrom called for submission to the jury of the charges remaining against them. The 17th count of the indictment, a substantive charge against Zoroiwchak involving Mrs. McKay, had been dismissed by the court at the conclusion of the testimony.

Appellants would have it that Bertucci and McCabe struck Flounders in self-defense and not with the specific

intent of enjoining him from attending the meeting. In addition to Flounders' trial testimony, the other evidence above noted concerning the episode was before the jury for its consideration. The evidence as a whole, to say the least, was quite sufficient for that body to decide as it did that the expressed purpose of Bertucci and the others involved in the Flounders incident was to attempt to bar him from the meeting and the exercise of his membership rights, which attempt was entirely successful. The effort to suggest that what Bertucci and McCabe did to Flounders was in self-defense was before the jury in connection with all the other evidence as to the episode. Appellants' requests to charge their requests 20, 21 and 22, dealing with that situation did not accurately present the actual legal and evidential picture. They were rightly denied. 23 and 27 are broader in scope; they suffer from the same basic defects. Request 25 was substantially covered in the charge. There was no specific objection to the refusal to charge it or 27. Neither one of them is legitimately before us.

Appellants contend that their requests for instructions 10 and 24 were erroneously refused. These dealt with advice of counsel to the Local. The trial record does not support those requests. There was no error in refusing request 26 that neither the union nor Mullen was on trial. The charge made it very clear just who was on trial. Request 19, with reference to testimony previously given by Flounders, was erroneous as presented. We find no material error in the court's handling of the reading of Flounders' Grand Jury testimony. There was no objection by the defense to the use of the testimony, it participated in that use. The judge specifically told the jury:

> "Ladies and gentlemen of the jury, by agreement of counsel and you are ordered by the Court that the reading of the testimony of this witness before the Grand Jury is not evidence but is purely for the purpose of refreshing this witness' recollection of his

testimony at that time as to what he said, as to his testimony before the Grand Jury."

There was no objection to this by the defense or suggestion of additional language, etc. United States v. 5 Cases, etc., 179 F.2d 519 (2 Cir. 1950).

Appellants assert that the conclusion of Judge Luongo in Axler v. Transportation Checkers, etc. (C.A. 30762 E.D. Pa.) should have precluded prosecution. The theory of this seems to be that any concept of wilfulness was eliminated from the case by Judge Luongo, therefore the judgment in Axler bars this action. No real support is produced for that view. What is offered is an involved speculative theory which cannot be accepted as authority for holding that Axler controls this prosecution. The Government was not a party to that civil litigation. The judgment there cannot be res adjudicata or estoppel of the prosecution in this case "• • • because the parties plaintiff in the two suits are neither the same nor in privity • • • and the nature of the actions are entirely different." Dranow v. United States, 307 F.2d 545, 557 (8 Cir. 1962). And see Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 689-690 (1961). United States v. Leventhal, 316 F.2d 341, 346 (D.C. Cir. 1963). The plaintiffs in the Axler suit were concerned with equitable remedies as related to their private rights. Here the Government sought to punish appellants for their public offenses.

Even the immediate issues before the court in Axler did not touch the criminal violations of the Local's members rights under the Labor Management Act upon which this prosecution is based. And the court there specifically stated in the very order upon which appellants rely that it was not passing upon "• • • whether the individual rights of those persons were violated such as to give them individual causes of action under the Act."

Appellants assert that the statute, 29 U.S.C.A. § 530, under which appellants were convicted, does not govern their conduct as revealed by the record. The further claim is made that if it does, it is unconstitutional. It is said that Section 530 which makes it unlawful for any person through threats or the use of force and violence to attempt to or to in fact interfere with or prevent the exercise of any or all rights that a union member may have under any of the titles of the Act, must be read in some sort of restrictive fashion which would eliminate Bertucci and Doherty as paid employees of the Local and McCabe, Abrams and Zoroiwchak as nonmembers. We have held expressly to the contrary in Tomko v. Hilbert, 288 F.2d 625, 627 (1961). There we distinguish sharply between the civil enforcement provisions of the bill of rights under Title I of the Act, Section 102, 28 U.S.C.A. § 412 and Title II of the Act which is what governs this appeal. We say pp. 626-627:

> "In contrast, Title II, 73 Stat. 524, 29 U.S.C.A. § 431 et seq., which imposes a duty on labor organizations, their officers and employees, and employers to prepare and file certain enumerated reports, can be enforced by a civil action under section 210, 29 U.S.C.A. § 440, against *any person*. Also, criminal sanctions are contained in section 610, 29 U.S.C.A. § 530, which makes it unlawful for *any person* through threats or the use of force or violence to attempt to or to in fact interfere with or prevent the exercise of any or all rights that a union member may have under any of the titles of the LMRDA."

We say further pp. 628-629:

> "To sum up, the LMRDA gives to the individual union members certain rights which when interfered with by a union, its officials or its agents, can be redressed civilly against them. In addition, there are

criminal sanctions imposed against *any person* who interferes with those rights."

Our above view was followed in United States v. Roganovich, 318 F.2d 167 (7 Cir. 1963), cert. den. 375 U.S. 911 (1963). There a member at a meeting of his local commented adversely on a report from the Business Representative. One of the defendants, a member of the local, and the other, a member of another local, attacked the speaker. The first one hit him with his fist and staggered him, the other one jumped on his back, brought him to the floor and then kicked him. Neither of the defendants was charged as being in any way connected with any officer or agent of the union. Both were charged merely as individuals. The were indicted, as here, under 29 U.S.C.A. §§ 411(a)(2) and 530, and thereafter convicted. The court held p. 170:

"We cannot agree with defendants' construction of § 530 as merely the criminal counterpart of, and no broader than, the civil enforcement section, § 412. Section 412 refers to infringement of rights by any violation of the subchapter. Section 530 deals only with use or threat 'of force or violence, to restrain' etc.

"As urged by both parties, we have studied the legislative history of the Act. We conclude that Congress was seeking to preserve for union members the right of free expression secure from interference by force or threat of force from *any person*, not merely from union agents or those acting on behalf of, or in concert with, them. Thus we must also conclude that § 530 as construed by the Trial Court, contrary to defendants' assertions, does bear a reasonable relationship to the ends sought to be achieved by Congress."

Appellants idea of the unconstitutionality of the statute is based upon their unwarranted hypothesis that in this appeal criminal sanctions were imposed as a result of "a brawl among members". The so-called "brawl" was found by the jury to have arisen out of appellants' conspiracy to prevent and actually preventing persons named in the indictment from exercising their right to attend and participate in the membership meeting of Local 161 and to express their views upon matters properly before the meeting. Similar circumstances were present in Roganovich. Both indictments and trials were directly under Title II of the Act and in accord with its letter and spirit.

This appeal has been presented and argued most competently and thoroughly on behalf of appellants. The latter were given a meticulously fair trial in the district court by Judge Bohanon and the jury. There were no trial errors of any substance. The evidence adequately sustains the jury verdicts in all instances. The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,345

UNITED STATES OF AMERICA

vs.

LOUIS BERTUCCI, also known as "Toots"; GLENN DOHERTY; MORRIS ABRAMS; WILLIAM McCABE, also known as William G. Smith; and JOHN ZOROIWCHAK, also known as John Zuroick

GLENN DOHERTY, *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed February 1, 1963 of the said District Court in this case be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

June 16, 1964

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,351

UNITED STATES OF AMERICA

vs.

LOUIS BERTUCCI, also known as "Toots"; GLENN DOHERTY; MORRIS ABRAMS; WILLIAM McCABE, also known as William G. Smith; and JOHN ZOROIWCHAK, also known as John Zuroick

LOUIS BERTUCCI, *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

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ATTEST:

IDA O. CRESKOFF
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UNITED STATES COURT OF APPEALS
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vs.

LOUIS BERTUCCI, also known as "Toots"; GLENN DOHERTY; MORRIS ABRAMS; WILLIAM McCABE, also known as William G. Smith; and JOHN ZOROIWCHAK, also known as John Zuroick

MORRIS ABRAMS, *Appellants*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed February 1, 1963 of the said District Court in this case be, and the same is hereby affirmed.

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WILLIAM McCABE, *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed February 1, 1963 of the said District Court in this case be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
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June 16, 1964

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,354

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LOUIS BERTUCCI, also known as "Toots"; GLENN DOHERTY; MORRIS ABRAMS; WILLIAM McCABE, also known as William G. Smith; and JOHN ZOROIWCHAK, also known as John Zuroick

JOHN ZOROIWCHAK, *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, GANEY AND SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed February 1, 1963 of the said District Court in this case be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

June 16, 1964

APPENDIX B

Defendants' Requested Instruction No. 20

It is not a violation of any criminal law to exclude a member from a union meeting. It becomes a violation only when the member is excluded by means of force or violence or threat thereof. If you find, therefore, that members were excluded from the February 22nd meeting in a peaceful fashion, simply by advising them that they were not permitted to remain at the meeting, you must acquit these defendants, even though you are of the opinion that the exclusion was improper.

Defendants' Requested Instruction No. 21

Any person has a right to protect himself against an assault or against what reasonably appears to him to be an assault. A person under attack also has the right to call upon such assistance as may be required to defeat the assailant, and the person or persons rendering such assistance, if acting reasonably, may properly do so without having committed an offense. If you believe, therefore, that Mr. Flounders struck the first blow or that defendant Bertucci could reasonably have believed that he was under attack, you are instructed that such reasonable force as Bertucci used in repelling attack may not be considered by you as an element of the offense here charged. You are further instructed that those who come to the aid of Mr. Bertucci are entitled to the same consideration, and that such reasonable force as may have been used by them cannot be considered an element of the offense here charged.

Defendants' Requested Instruction No. 22

You are instructed that if the first act of violence was committed by a person seeking entrance to the February 22nd meeting, rather than by those seeking to exclude members from attendance, you must acquit these defendants.

Defendants' Requested Instruction No. 23

Before the statute in question can be said to have been violated, there must have been both an improper exclusion and the exclusion must have been by means of force or violence or threat thereof. Therefore, if you find that Local 161 could properly have excluded the members denied admission to the February 22nd meeting, or, if you find the exclusion, even though improper, was accomplished peaceably, through request, you must acquit these defendants.

Defendants' Requested Instruction No 27

You are instructed that a spontaneous outbreak does not violate the law, even though such an outbreak occurs at or about the time members are being excluded from the meeting. Before the statute can be said to have been violated, the deprivation of membership rights, if such you find, must have been by means of force, violence or threat thereof.

APPENDIX C

Charge of the Court

BOHANON, *J.*

Ladies and gentlemen of the jury, now that you have heard the evidence in this case and you have also heard the argument of counsel, the time has come for the Court to instruct you with reference to the law in this case.

Although you, as jurors, are the sole judges of the facts, you are bound to follow the law as given to you by the Court in these instructions and to apply the law to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. That is, you are to consider all of the instructions.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law, other than that as given to you by the Court in these instructions.

An indictment is but a formal method of accusing a defendant of an alleged crime. It is not evidence of any kind against the accused, and does not create any presumption whatsoever or permit any inference of guil..

There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witngss. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of an offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of

the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Every defendant in a criminal case is presumed at the outset to be innocent, and this presumption exists in his favor and abides with him for his proper protection at every stage of the trial until his guilt is established by the evidence beyond a reasonable doubt.

The burden of proving guilt rests upon the Government and must be sustained by evidence which establishes guilt beyond a reasonable doubt.

By reasonable doubt is not meant a possible doubt, but such a doubt arising from the evidence or lack of evidence as leaves your mind in such a state that you cannot say that you have an abiding conviction to a moral certainty of the guilt of the accused.

If this is the state of your mind, you should acquit. If, however, after due deliberation and viewing of all the evidence, you can say that you have an abiding conviction to a moral certainty of the guilt of the defendant, then you should convict him.

You are the exclusive judges of the facts proved, the weight of the evidence and the credibility of the witnesses. In determining the issues in this case you will, of course, rely upon the evidence which you have heard in the courtroom. In weighing the testimony of the witnesses you have a right to consider their appearance, the manner in which they testified, their means of knowledge, apparent intelligence or ignorance, interest or want of interest in the outcome of this case, and all other facts and circumstances appearing on the trial which will aid you in arriving at the truth.

If you believe that any witness has wilfully testified falsely as to any material fact, you may disregard the whole or any part of his testimony; but you are not bound

to believe or disbelieve all the testimony of any of the witnesses.

In Count One of the indictment the Government charges in substance that on or about February 22nd, 1962, at Philadelphia, in the Eastern District of Pennsylvania, Louis Bertucci, also known as "Toots", Glen Doherty, Morris Abrams, William McCabe, also known as William G. Smith, and John Zoroiwachak, also known as John Zuroick, did knowingly, willfully and unlawfully conspire, combine, confederate and agree together and with each other, to commit offenses against the United States in violation of certain laws of the United States hereinafter quoted wholly or in part in these instructions.

It is charged that it was part of the plan and purpose of said conspiracy that the defendants willfully and unlawfully through the use of force and violence and threats of the use of force and violence to restrain, coerce and intimidate and attempt to restrain, coerce and intimidate certain persons named in paragraph one, page one, of the indictment, those certain persons then and there being members of a labor organization within the meaning of the law given to you in these instructions, and for the purpose of interfering with and preventing the aforesaid named persons set out in Count One of the indictment from exercising certain rights to which they were then and there entitled under the law, in that the said named persons were wilfully and unlawfully, through the use of force and violence, and threat of use of force and violence, restrained, coerced and intimidated from exercising their right to attend a membership meeting of Local Union Number 161 on February 22nd, 1962.

It further charges that the same named persons were prevented from exercising or expressing their views upon union business which was then and there under discussion and properly before a meeting of Local Union Number 161 and in violation of the laws of the United States.

It is further charged that in violation of the laws of the United States said named persons in Count One, being fully paid up members of said Union Number 16' were expelled——

Mr. Bergan: Pardon me, Your Honor. Are you going into paragraph three? I think we agreed to eliminate that.

The Court: Well, yes, I believe I am.

You are further instructed that the Government charges that in furtherance of said conspiracy and in order to effect the object, designs and purposes thereof, the defendants did do and perform certain overt acts in violation of the laws of the United States hereinafter given to you in these instructions. These overt acts, numbered one through seventeen, less Count Number Nine and Ten——

Mr. DePaul: Eight and nine.

The Court: Eight and nine, that's right, and contained in the indictment on page four to eight, and you may refer to the indictment and consider each of said acts and the parties named in each. However, you will not consider overt acts numbered eight and nine, that's right, herein, as they have been eliminated on order of the Court.

You are further advised that Section 371 of Title 18, of the United States Code provides in part as follows:

"If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . ." punished as provided by law.

You are further advised that Title 29, United States Code, Section 411 (a) (1) provides in part as follows:

"Every member of a labor organization shall have equal right and privileges within such organization . . . to attend membership meetings, and to participate in the deliberations and voting upon the business of such meet-

ings, subject to reasonable rules and regulations in such organizations' constitution and bylaws."

You are further instructed that Section 411 (a) (2) provides in part as follows:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; . . . or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of the meeting; provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . ."

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist of the offense is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they have been associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence need not show that the members entered into any expressed or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. What the evidence must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly, came to a mutual un-

derstanding to try to accomplish a common and unlawful plan.

It is not necessary for the prosecution to prove that all the means or methods set forth in the indictment were agreed upon to carry out the conspiracy, or that all such means or methods were actually used or put into operation. But it is necessary that the evidence establish to the satisfaction of the jury that one or more of the means or methods described in the indictment was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy as charged and set out in the indictment.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.

Before a jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do what the law forbids, or with specific intent to fail to do what the law requires; that is to say, to participate with the motive or purpose to disregard the law. So if the defendants or any other person, with understanding of the unlawful character of a plan intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilfull participant and he is therefore a conspirator.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators or originators of the conspiracy.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

If and when it appears from the evidence that a conspiracy existed and that a defendant was one of the members, then the act thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statements made outside of court by one person may not be considered as evidence against any person who was not present and heard the statements made.

In your consideration of the evidence as to the offense of conspiracy charged, you shall first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such conspiracy did exist, you should next determine whether or not the accused knowingly and wilfully became a member of the conspiracy.

If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and wilfully formed as alleged in the indictment, and that the a[illegible]d

knowingly and wilfully became a member of the conspiracy at the inception of the plan or scheme or afterwards, and that thereafter one or more of the conspirators knowingly committed, in furtherance of an object or purpose of the conspiracy, one or more of the overt acts charged, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

By the term "overt act" is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. An overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

In order to establish the offense of conspiracy charged in the indictment, the evidence must show beyond a reasonable doubt:

First, that the conspiracy described was formed and existing at or about the time alleged;

Second, that the accused knowingly and wilfully became a member of the conspiracy;

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

If you find from the evidence beyond a reasonable doubt that the existence of the conspiracy as charged in the indictment has been proved, and that during the existence

of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete, and it is complete as to every person found by you to have been knowingly and wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators commited the overt act.

Now, as to the other counts, in Count Two, Three, Four and Five of the indictment, the Government charges in substance that on or about February 22rd, 1962, at Philadelphia, in the Eastern District of Pennsylvania, the defendant named in each such counts did knowingly, wilfully and unlawfully, through the use of force and violence, restrain, coerce, and intimidate the person named in each count, he or she then and there being a member of a labor organization within the meaning of the law quoted to you in these instructions, for the purpose of interfering with and preventing the person named from exercising certain rights to which he or she was entitled under the law quoted to you in these instructions, in that said defendant did wilfully and unlawfully, through the use of force and violence, restrain, coerce, and intimidate the named person from exercising his or her right to attend a membership meeting of Local Union 161, and to participate in the deliberation and voting upon the business of such meeting on February 22nd, 1962, and to express his or her views, arguments and opinions upon the business properly before the meeting of said Local Union Number 161, and in violation of the laws of the United States, Section 411 (a) (1) and 411 (a) (2), Title 29 U. S. Code, heretofore quoted to you in these instructions, and also Section 530, which provides in part as follows, to wit:

"It shall be unlawful for any person, through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to re-

strain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this chapter. Any person who wilfully violates this section shall be . . ." punished as provided by law.

The essential elements required to be proved in order to establish the offense prescribed by the law last quoted to you are as follows, to wit:

One, the use or threat of the use of force or violence;

Two, to restrain, coerce, or intimidate any member of a labor organization, or threat to do so;

Three, for the purpose of interefering with or preventing the exercise by any member of a labor organization of equal rights and privileges to attend membership meetings, and participate in the business of such meetings.

Now, as to Count Six, Seven, Eight, Eleven, Twelve, Thirteen, Fourteen, Fifteen and Sixteen of the indictment, the Government charges, in substance, that on or about February 22nd, 1962, at Philadelphia, in the Eastern District of Pennsylvania, the defendants named in each of said counts did knowingly, wilfully and unlawfully, through threat of the use of force and violence, attempt to restrain, coerce, and intimidate the person named in each count he or she then and there being a member of a labor organization, within the meaning of the law quoted to you in these instructions, for the purpose of interfering with and preventing the person named from exercising certain rights to which he was entitled under the laws quoted to you in these instructions, in that said defendant did wilfully and unlawfully, through threat of the use of force and violence, attempt to restrain, coerce and intimidate the said named person from exercising his or her right to attend a membership meeting of Local Union Number 161, and to participate in the deliberation and voting upon the business

of such meeting on February 22nd, 1962; and to express his views, arguments and opinions upon the business properly before the meeting of said Local Union Number 161, and in violation of the laws of the United States heretofore given to you in these instructions.

You will note that the acts charged in the indictment are alleged to have been d[illegible] "wilfully".

An act is done wilfully if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with bad purpose, either to disobey or to disregard the law.

You will note that the acts charged in the indictment are alleged to have been done "knowingly." The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reasons.

With respect to offenses such as charged in this case, specific intent must be proved before there can be a conviction.

You will note that the acts charged in the indictment are alleged to have been done "unlawfully". Unlawfully means contrary to law. Hence to do an act unlawfully means to do wilfully something which the law forbids.

Specific intent, as that term itself suggests, requires more than a mere general intent to engage in certain conduct.

A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent.

An act or failure to act is done knowingly if done voluntarily and purposely and not because of mistake or inadvertence or other innocent reasons.

In every crime there must exist a union or joint operation of the act, or failure to act, an intent.

The burden is always upon the Government to prove both act or failure to act, and intent, beyond a reasonable doubt.

The use of force or violence, or threat thereat, to coerce, restrain or intimidate a person or attempt threat, need not be accomplished by specific words or acts. It is sufficient that a person be put in reasonable apprehension or fear.

You are instructed that the defendant, Jerry C. Barsuglia, named in Counts One, Nine and Ten of the indictment, has been dismissed from this case, and you will not consider said defendant in reaching your verdict.

Also, you are instructed that Count Number Seventeen of the indictment, the last count of the indictment has, by court order, been dismissed.

The evidence of William McCabe's previous conviction is to be considered by you only insofar as it affects his credibility as a witness before you, and must not be considered as any evidence of guilt of the offense for which he is now on trial.

The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of any defendant to take the witness stand and to testify.

The words "force", "violence", "restrain", "coerce", and "intimidate" as used in the indictment and in these instructions are to be given their ordinary meaning.

If you find that a witness has knowingly testified falsely concerning any material matter, you have a right to disregard all or any part of his testimony, or them testimony

of any witness which you deem is unworthy of your confidence.

As you have noted, a separate crime is charged in each count of the indictment. All the defendants are charged in Count One, and separate defendants are charged in the remaining counts. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find all, or some of the accused, guilty or not guilty of one of the offenses charged, should not control your verdict with respect to any other offense charged.

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case determined from the evidence which may be applicable to him.

The statements of counsel and arguments of counsel are not evidence in case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, and all facts which have been admitted or stipulated. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have

been proved, such reasonable inferences as may be justified in the light of all the circumstances before you.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes to be improper and should not be admitted.

When the Court sustains an objection to a question, the jury are to disregard the question and may draw no inference from the words or to speculate as to what the witness would have said if permitted to answer the question.

Upon allowing the testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the defendants plea of not guilty. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The accused and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court and reach a just verdict, regardless of the consequences.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocense of the accused in this case.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to

use your good sense; consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in the light of your common knowledge of the natural tendencies and inclinations of mankind.

If the accused be proved guilty, say so. If not proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individaal judgment. Each of you must decide the case for yourself but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict into open court.

At this time I will ask counsel if they care to make a record of the trail of the case up to this point? If you do you may come forward to the bar here. After that, why, we will swear in the Bailiff.

* * * * * * * * *

The Court: As a further item of instruction in reading to you, ladies and gentlemen of the jury, Section 411—

A Juror: We can't hear you.

The Court: In reading to you in the instructions, Section 411 (a) (2) of the Act of Congress, I neglected to read you the following which I will read to you now.

"—and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal and constitutional obligations."

Now then, further in the caption or in the style of this indictment, Mr. William McCabe is also referred to as Mr. William Smith, and you should draw no inference from the alias part of William Smith, inasmuch as there is no proof here that he is ever known as William Smith.

Now, with that the marshal will come forward and be sworn to take charge of the jury.

(The Marshal was sworn at 12:18 p.m.)

The Court: Now, ladies and gentlemen, there have been introduced many exhibits and they are all available to you, and the Court will give you the indictment that is filed in this case and anything that the Court can do to aid you in your work, please notify the Court through the Marshal or your Bailiff. He is there for your service. He will do anything that you ask him to do within reason and with that, it is now 12:20—I didn't know it, but here your foreman is determined by the one who gets the number one call to the jury box, so your foreman is already known to you, so you may go to lunch and after lunch, why, you come back and you go to your deliberation.

Please do not permit anyone to discuss this case with you, but you may discuss it as much as you please at lunch or any other place, but it is best, however, to confine your discussion in your jury room. That is the purpose of having you put in a jury room, so you may—will you take them to lunch?

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 289

GLENN DOHERTY, LOUIS BERTUCCI, MORRIS ABRAMS, WILLIAM McCABE AND JOHN ZOBOWCHAK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on June 16, 1964 (Pet. App. 17-21). The petition for a writ of certiorari was filed on July 16. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused a blanket request to read the grand jury testimony of all government witnesses in order to check for inconsistencies.

2. Whether the instructions to the jury adequately covered the issue of intent.

STATUTE INVOLVED

Section 610 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541 (29 U.S.C. 530) provides:

> It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Eastern District of Pennsylvania of conspiring to restrain, and of restraining, union members from exercising their rights in the union, in violation of 18 U.S.C. 371 and 29

U.S.C. 530 (I. 1–20, II. 569–571).[1] All of the petitioners were fined and sentenced to imprisonment for two years. In addition, some received periods of probation (II. 581–584). The convictions were affirmed on appeal.

The evidence may be summarized as follows:

Some of the members of Teamsters Local 161, which was composed principally of employees of the Philadelphia Transportation Company, wished to have various changes made in the union; to that end they organized a committee called SWEEP (I. 35, 76–79). On October 29, 1961, the union held a meeting which was adjourned before any member of SWEEP could be heard (I. 79–82, 108–109, 164–166). Thereafter, SWEEP members sought the aid of the district court to enforce their union rights. This resulted in a consent order postponing the postal referendum on a proposed collective bargaining contract from February 2, 1962, until after a meeting to be held on February 22, 1962 (I. 82–88). In order to forestall any action by SWEEP, the executive board of Local 161 decided to expel nine members of SWEEP and to refuse them admission to the meeting. When Edmund Flounders, a SWEEP member whose name was not on the list of expellees, was refused admission, a fight ensued. Flounders was severely beaten, another SWEEP member was injured and still other members of SWEEP were told by petitioners to leave the meet-

[1] The record consists of certified copies of the appendices prepared for the court of appeals and certified copies of the proceedings in the court of appeals. References to petitioners' two-volume appendix below will be by volume and page. The government's appendix will be referred to by the prefix "G."

ing (I. 89–91, 112–114, 167–170, 174, 190, 213–215, 226–228, 281–285, 325–327, 334–339; Govt. Ex. 17; II. 619; I. 130).

ARGUMENT

I. During the course of its direct examination of Edmund Flounders, the government, pleading surprise, used Flounders' grand jury testimony; it made this material (as well as all other relevant statements) available to the defense (I. 45, 61–62).

At the close of the direct testimony of the next witness, defense counsel obtained an extra-judicial statement of the witness pursuant to 18 U.S.C. 3500. He then stated (I. 94–95):

> This is the first witness for which I have had the occasion to do this but under the authority of the Giampa case last year in the Second Circuit I am going to ask Your Honor to examine in camera the Grand Jury testimony of all persons who testified for the Government and if inconsistencies are found to turn them over to the defense to utilize in cross examination.
>
> MR. DEPAUL. The government has no objection.
> THE COURT. Very well.

No requests for grand jury minutes were made during the examination of further government witnesses (see I. 139, 153, 171, 193, 209, 215)[1] until police officer George Kaczur finished his direct testimony. Defense counsel thereupon demanded his grand jury

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[1] In *United States v. Giampa*, 290 F. 2d 83, the Second Circuit held that, upon request, the trial judge should inspect grand jury minutes for inconsistencies.

Requests for producible statements under 18 U.S.C. 3500 were, however, made and granted. See citations in text.

testimony, and the court took the matter under advisement (I. 245–246). The following morning, the trial judge ruled that he would not make grand jury testimony generally available to the defense but would make it completely available in the situation where there was a claim of surprise (I. 255–256). There were no further requests for grand jury minutes. The defense, however, was provided statements by the various witnesses. (See I. 285, 310, 343.)

Subsequently, on the motions for a new trial and judgment of acquittal, further reference was made to the broad demand for grand jury testimony and the specific request in connection with the testimony of the officer. The judge noted at this point that he had in fact read the grand jury testimony of that witness and found nothing in it at variance with the testimony the witness gave at the trial. He stated further that he did not feel that he had the duty of reading through the testimony of all the witnesses to see whether there was any variance (I. 206–207).

Petitioners are apparently contending for a rule which would require district judges to read the grand jury testimony of all witnesses and to comb it for possible inconsistencies whenever they are requested to do so. There was no showing, we emphasize, of any "particularized need" (see *Pittsburgh Plate Glass* v. *United States*, 360 U.S. 395) in this case—merely a request at large.[1] There is no suggestion in

[1] It is doubtful whether a mere wholesale request is sufficient under *United States* v. *Gilmore*, 290 F. 2d 83, 85 (C.A. 2). This is not to deny that the Second Circuit practice goes further than that of the other circuits.

any decision of this Court that it is incumbent upon the district courts to assume this onerous burden whenever the defense bids it—a rule which would make the request virtually automatic. *Pittsburgh Plate Glass* points clearly in the contrary direction. In the very excerpt quoted by petitioners (Pet. 14), this Court observed that the defense had not requested the judge to read the grand jury testimony and had therefore failed to "invoke [his] discretion." Since petitioners here failed to make any showing whatever in support of their wholesale request and since they were freely granted access to all other potentially impeaching materials, there assuredly can be no claim of abuse of discretion. We submit that there is no occasion for this Court to consider a departure from the salutary rule that there is no automatic duty upon the trial court to read grand jury transcripts in a "hunt for possible inconsistencies." *Berry* v. *United States*, 295 F. 2d 192, 196 (C.A. 8), certiorari denied, 368 U.S. 955.

2. The trial judge charged the jury that an element of the offense was the intent to deprive the members of their rights in the union (II. 557). He then instructed (II. 558) that an

> * * * act is done wilfully if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with bad purpose * * *.
>
> You will note that the acts charged in the indictment are alleged to have been done

> "knowingly." The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reasons.

He also charged on the requirement of specific intent, saying[5] (II. 558):

> With respect to offenses such as charged in this case, specific intent must be proved before there can be a conviction.
>
> * * * *
>
> Specific intent * * * requires more than a mere general intent to engage in certain conduct.
>
> A person who knowingly does an act which the law forbids, * * * intending with bad purpose either to disobey or to disregard the law, may be found to act with specific intent.

Under these instructions the jury could not convict petitioners "simply because Flounders was in a fight" (Pet. 25).

The court properly rejected petitioners' request for a series of charges which were designed to focus upon who "threw the first punch." As the trial judge noted, this was not an assault and battery case (II. 565; see also G. 207–208). The statute could be violated by threats without actual violence. Indeed, this is precisely what happened to some members of SWEEP. For example, one of the petition-

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[5] *Screws* v. *United States*, 325 U.S. 91, cited extensively by petitioners, provides no support for their position because the trial judge did in fact require that the action be with specific intent.

ers threatened Mrs. McKay and Mrs. Corr in the meeting hall with the words—"Well, my orders are both blondes go" * * * "Don't make me have to put you out" (I. 104). See also I. 168–169. The question of who committed the first act of violence was not the significant issue in this cause. The issue, which was properly submitted to the jury, was the use of violence or threats for the purpose of preventing the exercise of union rights by union members.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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